BOOK REVIEWS.

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Boston: Little, Brown & Company, 1904. Vol. I, pp. lv, 1002.

One need read only the preface of this work to be aware that something distinctly better than the average text-book lies before him. The farther he proceeds in his examination of the text itself the more is this impression comfirmed. Of all the books on Evidence, and the writer knows of over eighty, this is, everything considered, easily the best. But one qualification need be made. Professor Thayer's Preliminary Treatise is, so far as it goes, without a flaw. But its scope is so limited that any comparison between it and Professor Wigmore's work is out of place. The four volumes of this new treatise are to cover the whole field of Evidence proper, with supplementary chapters on those related subjects which are usually included, such as the Parol Evidence Rule, Presumptions, Burden of Proof, and others.

If the first volume may be taken as a sample, we are to have not merely a legal treatise, such a work as will serve the daily needs of the profession in the best way, but also a history of the law of Evidence. This historical matter is of the highest practical importance. If one would know how our law of evidence, or for that matter our law as to anything, is to grow, he must first find out how it has grown. Mr. Wigmore appropriately recognizes Professor Thayer's work in this field of legal history. He may do this without fear of dimming his own accomplishments in the same direction. His discussions of the origin of the rule excluding witnesses if parties or interested (§ 575 ff.) and of the history of our law concerning confessions (§ 817 ff.) are but examples of the new historical light which we owe to him.

His treatment of the present law is also highly satisfactory. In the limits appropriate for a review one may only catalogue some especially noteworthy matters. He has gathered the authorities, deduced the principles from them, and stated the law on many questions not ordinarily if ever dealt with in the text-books. Four hundred and seventy-three pages are devoted to circumstantial evidence. They are full of examples of the new matter just mentioned. He gives us the authorities determining whether the physical capacity of a person is *admissible* to prove that he did an act (§ 83 ff.), whether one's custom as to the terms of contracts he makes is *admissible* to prove the terms of a particular contract he made (§ 377), whether plans of the deceased to commit suicide may be proved as tending to negative murder (§ 113), whether X-ray photographs are admissible (§ 795). The admissibility of evidence of crimes committed by the defendant other than the one he is indicted for where relevant to prove his motive, knowledge, plans, intent, or identity is more thoroughly discussed than ever before. There are sixty-two pages exclusively devoted to this. Section 15, telling us how far the admission of incompetent evidence without objection will make other incompetent evidence from the opponent admissible, is new and excellent.

But likely our greatest debt to Professor Wigmore is owing for his clear statement of the principles underlying our law of Evidence. This must be observed for one's self in order to be fully appreciated. He gives us, as to any topic, the best statements from courts or text-writers, of the reasons for and against the rule in question. He summarizes these so as to make their meaning perfectly evident and concludes with his own views. In his hands the law of Evidence becomes a fairly consistent whole. These quotations from cases and treatises are not thrown together in place of text as is too common. They are in separate type and illustrate the text. The reasons underlying any particular subject are made still more apparent by the fact that everywhere other analogous though different principles are distinguished and references to their complete discussion added.

A feature that deserves high praise is the statement in connection with each citation in the notes of the salient facts of the case. This is most enlightening and useful in all cases where one's object in reading does not necessitate a personal examination of each case. Not so desirable is the substitution of id. for the name of the report in second and further citations in the same note. The fact that the statutes of the various jurisdictions modifying the common law have been thoroughly collected, as in § 488 to the extent of thirty-eight pages, also adds very greatly to the value of the work.

Are there no defects in this most excellent work? Such as may be thought to be present do not seriously impair its value and usefulness. One may, perhaps justifiably, criticize its nomenclature. In general it seems better to use familiar terms rather than new ones even if the latter are more accurate. The substitutions of "Autoptic Preference" for "Real Evidence," of "Mental Immaturity" for "Infancy," of "Emotional Capacity" for "Interest" and "Marital Relationship," of "Specific Error" for "Contradiction," of "Self-Contradiction" for "Inconsistent Statements" seem unfortunate. To speak of "Prophylactic Rules" and "Viatorial Privilege" is also of questionable expediency.

In dealing with the true limitations on specific rules (the really important matter) the greatest good judgment is displayed. But one might well dissent from the author's general classification. The main title of Relevancy is made to include the rule against character evidence with its limitations, the rule against using conduct to prove character, competency of witnesses, the law concerning the use of memoranda to stimulate or supplement the recollection of a witness, the examination of witnesses, the doctrine of confessions, the impeachment and rehabilitation of witnesses, the law of admissions, and real evidence. This seems a forced analysis. The fundamental difficulty, if there be one, appears to lie in the author's conception of relevancy. In § 12 he rightly rejects Mr. Justice Stephen's view that admissibility and relevancy are identical. But in § 27 and the sections following we are told that relevancy is not the same as "minimum probative value," that there is a legal relevancy which means a probative value greater than that which logic or ordinary reasoning would demand. That evidence is often excluded when of slight value cannot be disputed. That the reason for thus excluding it, exceptional cases aside, is irrelevancy, may be doubted. There

may be cases where courts, often untrained in the niceties of logic, have excluded evidence really relevant because of a mistaken notion that it was in fact irrelevant. But we are shown no case where a court, admitting the real relevancy of a piece of evidence, has excluded it on the ground of legal irrelevancy. Evidence of slight probative value is excluded where it merely complicates or lengthens the trial without having sufficient value to compensate for this, where the jury may misuse it, where a party may misuse it, where it creates undue prejudice, and for other similar reasons. These are not tests of relevancy. Professor Thayer has stated the fallacy of this new "legal relevancy" in his Cases on Evidence, 2nd Ed., 229, note 1. Legal relevancy and logical relevancy are the same except in those comparatively few cases where courts have misapplied the test of logical relevancy.

In § 265 and those following it, Professor Wigmore reaches the conclusion that conduct, when used to evidence the knowledge or belief of a person, is open to the objection of being hearsay. He of course gives us a full statement of the well-settled instances where it is admitted, though coming under none of the usual exceptions to the Hearsay Rule. He deals with these instances as exceptional. It may be doubted whether this conclusion is proper. It rests mainly and almost entirely on the case of *Wright* v. *Tatham* 9 Cl. & F. 670. That case is distinguishable. The conduct there was offered to evidence an opinion as to a testator's sanity. The opinion was by non-experts and should have been preceded by a statement of its basis (Greenleaf, 16th ed., § 441 f.), a thing obviously not done. Further it is questionable if an opinion is ever admissible unless the party whose opinion it is is on the stand. *Young* v. *White* (1853) 17 Beav. 532; *Bradford* v. *Co.* (1888) 147 Mass. 57. *Wright* v. *Tatham* is therefore far from conclusive. Certainly action or conduct has probative force much in excess of mere declarations. Certainly it is novel to suppose that when one offers the conduct of a person in evidence he may be met with the objection that it is hearsay. Certainly in all the instances which Professor Wigmore has collected the courts have admitted conduct without requiring that it meet the tests of admissibility set for declarations. Moreover, some courts have expressly distinguished the two. See § 142, note 1.

Possibly what the author calls using a "Past Recollection" (§ 734 ff.) might be dealt with in a simpler way. A made a written statement of some fact material to the present issue. He now remembers and can testify that the statement was accurate, but has forgotten the circumstances it records. It is said that he uses the statement as a "Past Recollection." This seems an unnecessary complication. His testimony that the statement is accurate is certainly unobjectionable. This makes the contents of the statement relevant. The statement then appears clearly admissible to prove its own contents, subject of course to proper identification. If the statement be lost or otherwise unavailable, the ordinary rule allowing the proof of contents by secondary evidence applies. If the statement be oral rather than written there seems no good reason why its terms, having been made relevant by the testimony to their accuracy, should not be proved by any otherwise competent evidence. See § 751.

The rule that a sworn copy is admissible, if the original is unavailable, is simply a plain instance of proving the accuracy of a statement by a witness who cannot remember the facts (here the contents of the original) which it records.

But despite these possible criticisms, concerning the validity of which a difference of opinion is of course possible, we shall have in Wigmore on Evidence a work which must certainly prove of the highest value to the profession.

PARSONS ON CONTRACTS. Ninth Edition. Three Volumes. Annotated by Prof. Williston, Mr. Keller, and Mr. John M. Gould. Boston: Little, Brown & Company, 1904. pp. 2159.

In these days of Specialization, "Parsons on Contracts" is an antiquity. It was in many respects a pioneer work when it was first published; it marked a distinct and important step in the development of law book making, not to say in the development of the law; and undoubtedly its author was a man of wide learning and of good abilities. But are those any reasons why we should cling to this publication which has outlived its usefulness long since, or why we should be asked to purchase it in its present form of a ninth edition, which is at least two-thirds made up of notes by others than the original author, and nine-tenths of the value of which consists in those same notes of others than the author.

"Parsons on Contracts" in and of itself has no place in the modern scientific development of study and instruction in the law of contracts—unless it be to mark a phase of their history. The original work contained a little of everything and not much of anything valuable on the law of simple contracts. The work treats many different kinds of contracts, but is not exhaustive nor very precise on any of them. For example we find treatises on Agency, Factors and Brokers, Trustees, Executors and Administrators, Guardians, Partnership, Negotiable Paper, Gifts, Infants, Sales of personal property, and the leasing of Real Property. What a conglomeration as a basis for the study of or instruction in the law of contracts! Doubtless for those who have made no close study of the various branches of law, the book might be said to furnish a starting point of information in the preparation of a pleading or a brief, but doubtless also there are several excellent digests now published which would much better serve this purpose. No one, we venture to say, who did not approach this work with a fairly good previously acquired knowledge of the law of simple contracts, could use it to advantage; and the beginner would be thrown into hopeless confusion by its unscientific method of treatment. We are well aware that it has been employed as a basis of instruction in some law schools, notably in our own, but the value of the course in contracts consisted in the notes dictated by the instructor, and the explanations and corrections of the text made by him.

A scientific treatment of the study of or instruction in law requires that fundamentals be dealt with and learned first and specializations afterward. Any other treatment is putting the cart before the horse. What then should be said of a work, which when published, was claimed to be a scientific and exhaustive treatise on the law of con-